# Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 1168, 1169, 1170, 1172, 1173, and 1174

HUDSON McGUIRE, *et al.*, Debenture Holders; and HARRY R. AMOTT, *et al.*, Committee of Debenture Holders; and J. DONALD DUNCAN, Trustee,

*Petitioners,*

*against*

EQUITABLE OFFICE BUILDING CORPORATION, Debtor; and ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders; and CHARLES A. DANA, *et al.*, Committee of Common Stockholders,

*Respondents.*

## BRIEF OF STOCKHOLDERS KNIGHT AND DOYLE IN OPPOSITION TO PETITIONS FOR CERTIORARI

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## BRIEF OF STOCKHOLDERS KNIGHT AND DOYLE IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is filed on behalf of Adelaide H. Knight and William P. Doyle, common stockholders, in opposition to the petitions for certiorari filed

(a) by Hudson McGuire, et. al., Debenture Holders of Debtor (Nos. 1168, 1169, 1170); and

(b) by Harry R. Amott, et. al., Committtee of Debenture Holders of Debtor, and J. Donald Duncan, Trustee of Debtor (Nos. 1172, 1173, 1174).

As these cases, insofar as Adelaide H. Knight and William P. Doyle are concerned, arise from identical facts and

present the same question, respondents respectfully request permission to file this single answering brief.

## Question Presented

Did the Circuit Court of Appeals err in ruling that stockholders of a solvent debtor have the right, before consummation of a plan of reorganization, to preserve their equity by paying creditors in full with interest?

The artificial subdivision of this sole issue by petitioners and their additions of extraneous matter is only confusing and accordingly ignored.

## Statement of Facts

On May 13, 1946, the District Court confirmed the Trustee's Plan, although approval was secured from less than 20% of the stockholders (R. 246-247). On July 11, 1946, prior to the consummation of the Plan, the transfer of any of the debtor's assets or the issuance of any new securities, Knight and Doyle, stockholders, appeared before the District Court and petitioned for modification of the Plan so as to give the stockholders an opportunity to preserve their equity. The modification proposed by the stockholders, which was then underwritten by the City Investing Company, provided for payment in full, with interest, of the claims of the debenture holders in lieu of the proposed allocation to them of 92% of the assets of the debtor as provided in the Plan. The immediate opposition of the debenture holders to the modification was readily understandable since the then market price of the debentures was double the amount of their claims plus accrued interest (R. 28, 35). Instead of receiving a mere 100 cents on

the dollar, they naturally preferred to foreclose on the equity, leaving to the stockholders less than 9% thereof.

Without receiving any testimony and without considering the merits of the stockholders' proposal, the District Court denied their petitions. The Circuit Court of Appeals, having all the facts before it, reversed, holding in effect that the modification offered by the stockholders Knight and Doyle was fair, equitable and feasible and that the District Court abused its discretion in failing to approve the modification and submitting it to the stockholders for acceptance or rejection.

The debenture holders then made application to the Circuit Court of Appeals to modify its opinion by limiting the time of the stockholders to produce an underwriting to a maximum of thirty days after the issuance of the mandate. Obviously, no underwriter would come forward during such period while the possibility of appeal remained. Recognizing that the debenture holders' desire to so limit the time for submission of proposals was motivated not by a legitimate need to protect the payment of their claims but by the hope of working a forfeiture, the Circuit Court ruled that such underwriting could be produced at any time up to sixty days after no further possibility of appeal remained.

The debenture holders have now learned that the necessary underwriting is again available to the stockholders. It is their purpose in petitioning this Court for certiorari to so delay the reorganization proceedings that the current underwriting offer will be withdrawn and that they will then be able to accomplish the foreclosure for which they have so arduously pressed.

## Reasons for Denying the Writs

### I.

**THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER COURT OF RECORD.**

There has never been a holding by any court that stockholders of a solvent debtor could not modify a plan of reorganization after confirmation, but before consummation, so as to preserve their equity by providing for payment to creditors in full.

(a) In view of the familiarity of the Court with its recent decision in *Insurance Group Committee* v. *Denver and Rio Grande Western R.R.* (No. 690—October Term, 1946), it is unnecessary to elaborate the point that there is no conflict between that decision and the ruling of the Circuit Court in this case. Mr. Justice Reed clearly distinguished the two situations, saying:

> "Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 541."

Suffice it to say, payment in full with interest for the objecting creditors was not provided for in any of the railroad reorganizations and reconsideration, not modification, was involved in each.

(b) The debenture holders allege that the decision of the Circuit Court is in conflict with its previous holdings and with the views of other circuits. In the absence of more apposite cases, they support this argument by reference to *In re Diversey Bldg. Corp.* 141 F. (2d) 65 (C. C. A. 7th, 1944), and *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (C. C. A. 2nd, 1944), together with a few other cases even less in point. The language quoted from the *Diversey* case might make it appear that the Court had in mind a situation where, as here, a plan had been confirmed but not yet consummated. That this language was taken out of its context is shown by the following quotation from the opinion, the Court distinguishing a situation such as the present one:

> "Here the Plan as confirmed had been in operation for almost eight years. . . . In support of its contention, appellant relies on *In re H. W. Clark Co.,* 79 F. 2d 681, *Downtown Investment Association* v. *Boston Metropolitan Buildings,* 81 F. 2d 314 and *In re Celotex Co.,* 12 Fed. Supp. 1. These cases relate to amendments of the Plan of reorganization before its consummation and for that reason we think they are not in point." (pp. 68-69)

An examination of the record in the *Country Life* case discloses that the appellants did not rely on or even cite Section 222 which expressly authorizes modifications of a plan after confirmation. They called their proposals a new plan. The District Court had described this plan as a lot of claptrap, unfair, inequitable and not in good faith. The approved plan, like the proposed modification here, provided for the payment of creditors in cash. The "claptrap", resembling the instant Plan, called for delivery of new secu-

rities and control to the proponent who was castigated by the District Court as unjustifiably selfish. (A copy of this unreported opinion of the District Court is submitted with this brief.)

In any event, the *Country Life* case establishes that the debenture holders have no standing to object to the proposed modification. The Circuit Court held (p. 938):

> "Under Bankruptcy Act, § 179, no acceptance need be obtained from a class of creditors or stockholders 'for whom payment or protection has been provided' as prescribed in § 216 (7, S). See 3 *Gerdes on Corporate Reorganizations,* 1936, § 1113."

It is accordingly evident that petitioners cannot seriously challenge the power of the Court to approve the proposed modification. If there were ever any question about it, the matter was squarely decided adversely to petitioners' contention in *In re 1934 Realty Corp. (Hurd Committee* v. *Prudence)* 150 F. (2d) 477 (C. C. A. 2nd, 1945); cert. den. 326 U. S. 734 (1945). The argument that the Court lacked power to make "changes which do not aid in carrying out an approved Plan", (Amott Brief, p. 12) was also there urged in the petition for certiorari, surprisingly enough by the same counsel who now represents the Trustee in the instant matter. In his petition (p. 10), he contended that the Circuit Court of Appeals had erred

> *"in holding that after* adjudication of petitioner's status and the *confirmation* of a plan, where consummation required only the preparation, execution and delivery of formal documents specified in the plan, and neither the adjudication, nor the order of confirmation can be appealed from, *amendments may be approved which adversely affect petitioner's* status, over petitioner's objections."

This Court did not deem the argument of sufficient substance to warrant the granting of certiorari. The reasons are abundantly clear from the opinion of this Court in *Young* v. *Higbee,* 324 U. S. 204, 214 (1945).

## II.

### THE CIRCUIT COURT OF APPEALS WAS IN JUSTICE COMPELLED TO REVERSE THE DISTRICT COURT.

(a) It correctly ruled that a proposed modification which is fair and equitable and is opposed only by a class of creditors not materially and adversely affected must be approved.

The modification proposed by respondents is fair and equitable to all interested parties. The first mortgage would remain undisturbed. The holders of the second mortgage bonds would receive their interest as well as the full principal amount of their claims. The debenture holders would likewise receive payment in full with interest. The stockholders would receive that to which they are entitled, namely, the right to preserve their equity.

The proposed modification is opposed only by the debenture holders. It is supported by the S. E. C., the debtor, the stockholders and the holders of the second mortgage bonds (R. 166). The holder of the first mortgage, which would remain undisturbed, has taken the position that it is not materially and adversely affected and has indicated its acceptance (R. 164).

The debenture holders have no standing in a court of equity to attack a modification which provides for the payment of their claims in full with interest, since such debenture holders are not adversely affected by the proposal.

> "A class of creditors whose claims are to be paid in cash in full are obviously not adversely affected." 2 *Gerdes on Corporate Reorganizations*, 1683.

See also

> *Country Life Apartments* v. *Buckley, supra; National City Bank* v. *O'Connell, Trustee of U. S. Realty*, 155 F. (2d) 329 (C. C. A. 2d, 1946).

It should be noted that petitioners' complaint "that the effect of the decision is to leave no field for the exercise of discretion by the District Court" (Amott Brief, p. 25) is unfounded. The Circuit Court of Appeals, having all the facts before it, in no way denied the existence of discretion in the District Court. It affirmed that discretion, holding, however, that the failure of the District Court to approve the stockholders' petition in this case was an abuse of discretion, requiring reversal. Thus, what the Circuit Court did in reversing the District Court was to rule that the modification proposed by the stockholders was fair, equitable and feasible, and that therefore the District Court should have approved it. Certainly, the determination by the Circuit Court that the stockholders' modification should have been approved by the District Court is an entirely different matter from taking away this prerogative of the District Court and vesting it in the stockholders. From the schedule presented at page 162 of the record on appeal, the Circuit Court could readily determine that the reorganized company could fulfill its obligations after consummation of the Plan as modified by the stockholders. The Trustee's last monthly report discloses the reliability of this estimate, since it shows that the debtor had in cash at the close of business on March 31, 1947, the sum of $2,720,941.46.

(b) After the decision by the Circuit Court of Appeals, the petitioners informally advised all parties in interest that they did not intend to seek review of the decision of the Circuit Court. They then made application to that Court to modify its decision so as to limit the time of the stockholders for obtaining a suitable underwriting to a mere thirty days. The debenture holders knew that no underwriter would come forward while the possibility of appeal remained. The Circuit Court appreciated what was behind this maneuver by the debenture holders, for in its modifying opinion the stockholders were given sixty days to come forth with the requisite underwriting after no further possibility of appeal remained. The present contention that the Circuit Court should have dismissed respondents' appeals upon the ground of mootness is obviously made with tongue in cheek, since it is only because of their knowledge that the stockholders have made new arrangements with an underwriter that they have now petitioned for certiorari. If the matter were really moot, the debenture holders would merely have waited for the time of the stockholders to expire on May 31, 1947, and they then would have proceeded with their original plan. Their failure to wait until that date without applying for writs of certiorari, can be taken by this Court as conclusive evidence that the debenture holders themselves do not rely upon their contention of mootness.

(c) The Circuit Court of Appeals deemed unworthy of notice the contention of the petitioners that the application of the stockholders was in effect a motion for a rehearing. Mr. Justice Reed of this Court also advised the present petitioners upon the oral argument of the previous appeal that he saw no merit in this contention and he likewise refused

to give consideration to it in his opinion. In view of this, respondents see no need to further discuss the point other than again to state, on the authority of *In re 1934 Realty Corp. (Hurd Committee* v. *Prudence), supra,* that the denial of an application for modification of an order of confirmation is unquestionably appealable. This is conceded by petitioners (Amott Brief p. 26) despite their formal argument to the contrary (Amott Brief p. 32).

## III.

### NO QUESTION HAS BEEN PRESENTED WHICH NECESSITATES CONSIDERATION BY THIS COURT.

As has been previously pointed out, there is no conflict among the decisions of the Circuit Courts. The determination of the single question presented is so elementary as to not warrant reconsideration by this Court. Petitioners have tried to give the misleading impression that the prior opinion of Mr. Justice Reed in this case left certain questions open for special determination by this Court. (Amott Brief, p. 21). On the contrary, Mr. Justice Reed has stated that these issues are regarded as matters for determination by the Circuit Court:

> "This determination can only be obtained after decisions by the Circuit Court of Appeals." (R. 368)

Therefore, unless the Circuit Court of Appeals erred in ruling that stockholders of a solvent debtor, before consummation, could preserve their equity by paying creditors in full with interest, further review is unnecessary and could cause the stockholders to forfeit their equity through the loss of the underwriting.

Respondents therefore pray that the several petitions for certiorari be denied.

Respectfully submitted,

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April 17, 1947.